

EXHIBIT M

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Richard Seeborg

ANIBAL RODRIGUEZ, et al.,)	
)	
Plaintiffs,)	
)	
VS.)	NO. 3:20-cv-04688 RS
)	
GOOGLE, LLC,)	
)	
Defendant.)	
_____)	

San Francisco, California
Thursday, July 25, 2024

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued on next page)

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Thursday - July 25, 2024

1:28 p.m.

P R O C E E D I N G S

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THE CLERK: Calling case 20-CV-4688, Rodriguez versus Google.

Counsel, please state your appearances.

MR. BOIES: Good afternoon, Your Honor. David Boies from Boies, Schiller & Flexner on behalf of plaintiffs.

THE COURT: Good afternoon.

Go ahead.

MR. MAO: Good afternoon. Mark Mao, Boies, Schiller.

MR. LEE: Good afternoon. James Lee, Boies, Schiller.

MR. YANCHUNIS: Good afternoon, Your Honor. John Yanchunis with Morgan and Morgan.

MR. SILA: Good afternoon, Your Honor. Ryan Sila from Susman, Godfrey.

MR. McGEE: Good afternoon, Your Honor. Ryan McGee from Morgan and Morgan.

THE COURT: Good afternoon.

MS. SANTACANA: Good afternoon, Your Honor. Eduardo Santacana of Willkie, Farr & Gallagher for Google. And I have counsel here who can introduce themselves. We also have in-house counsel from Google.

MR. HUR: Good afternoon. Ben Hur also from Willkie, Farr.

1 **MS. AGNOLUCCI:** Good afternoon. Simona Agnolucci also
2 from Willkie, Farr.

3 **MS. FLOREZ:** Good afternoon. Argemira Florez, also
4 from Willkie, Farr.

5 **THE COURT:** Good afternoon. So we are here on
6 Defendant's Motion for Summary Judgment.

7 I will look to the moving party to start the discussion.
8 I don't -- I think you may have provided or some indication
9 you've provided some additional material in the form of
10 demonstrative, I guess we can call it, items. Generally I
11 don't like those for motion arguments. It's not that parties
12 intend this, but it is a bit of an end run around our page
13 limits. In patent cases I've given up because they use it in
14 every single one, Power Points and other things.

15 I won't preclude you from using it, and you can make
16 reference to it, but certainly for consideration of the motion
17 I'm not going to be relying on any of the materials that you
18 use in that fashion, because at best they are demonstrative
19 materials.

20 Okay. So if the moving party wants to begin.

21 **MS. SANTACANA:** Thank you, Your Honor.

22 I'm actually not aware of any demonstratives on either
23 side in this matter.

24 **THE COURT:** Oh, good.

25 **MS. SANTACANA:** I don't know if the plaintiffs have

1 any, but we do not.

2 **THE COURT:** I thought I was told that somebody had
3 submitted some materials, but maybe I'm mistaken.

4 Okay. Go ahead. So you're not patent lawyers, so that's
5 great.

6 (Laughter)

7 **MS. SANTACANA:** Not today.

8 Your Honor, there are three central reasons why this case
9 should be dismissed. First, Google said what it meant and it
10 did what it said. Second, to the extent Google didn't get the
11 language exactly right, what it did do with the data in
12 question was harmless and not highly offensive. Third,
13 Google's intent, backed up by major investments and
14 safeguarding pseudonymized user data, cannot give rise to
15 liability under the two remaining claims in the case.

16 I'll turn first to consent.

17 Google's internal view of the WAA button was exactly what
18 it told users it was, that the button should control whether
19 app activity data is saved to a user's Google account or
20 instead treated as non-personal information.

21 **THE COURT:** Let me just stop you on this. What
22 constitutes personal information and what would a user
23 understand that characterization to be?

24 You take the position that it's just crystal clear that if
25 you read through your privacy policy any user is going to

1 understand the distinctions that you're drawing. But on what
2 do you base that?

3 I mean, this label "personal information" and that being
4 what, you think the user understands is the only thing that's
5 not being shared; is that really reflected in your privacy
6 policy materials?

7 **MS. SANTACANA:** It is, Your Honor. And I want to make
8 one preliminary point before answering your question, which is
9 that to the extent a user is unclear about what personal
10 information is and is not, it's not clear to me that that
11 should inure to Google's detriment here, and the reason for
12 that is because Google secured an underlying express consent
13 for the data collection in question, which is basic ad
14 recordkeeping collection and analytics customer servicing.

15 The question here is whether the plaintiffs clearly
16 withdrew their consent after giving it to Google by turning WAA
17 off.

18 **THE COURT:** I mean, they made their -- the users, who
19 are the class members here, made it known in no uncertain terms
20 that they didn't want some of their information shared. Now,
21 whether or not, as you say, they should have been clear on
22 what's being saved and not, we can all agree that --

23 **MS. SANTACANA:** Yes.

24 **THE COURT:** -- these class members took the
25 affirmative step of switching off the --

1 MS. SANTACANA: Yes.

2 THE COURT: -- the two switches, if you will.

3 MS. SANTACANA: Yes. And if you look at their
4 briefing, every single time they talk about scope of consent,
5 they say that the legal standard is consent is not an
6 all-or-nothing proposition, you have to look at the context, it
7 might be yes for this and no for that. And so the same applies
8 when we're talking about withdrawal of consent. They asked to
9 withdraw consent for something. The question is how broad is
10 that scope.

11 So your specific question was, what is the definition of
12 "personal information?" How do they know the difference
13 between personal and non-personal information? It's actually
14 right in the privacy policy. The first paragraph in the
15 privacy policy says if there's anything in here you don't
16 understand, click here, read the key terms definitions.

17 There's three key terms that are relevant to this motion.
18 the first is "Google Account," the second is "non-personally
19 identifiable information," and the third is "personal
20 information," which is where I'm going to start.

21 So, the WAA button says it controls what is, quote, saved
22 to your Google account. The definition of personal information
23 says this is information which you provide to us which
24 personally identifies you, such as your name, email address,
25 your billing information or other data which can be reasonably

1 linked to such information by Google, such as information we
2 associate with your Google account. Associate with your Google
3 account.

4 So here, again, Google is mirroring the language in the
5 WAA control, and it does it all throughout the privacy policy,
6 right? In the main body of the privacy policy, what Google
7 says is this is what a cookie is, this is what similar
8 technologies to cookies are. And we say information we collect
9 when you're signed in, in addition to information we obtain
10 from partners, quote, may be associated with your Google
11 account. When information is associated with your Google
12 account, we treat it as personal information.

13 This is unlike page 4 of the privacy policy.

14 **THE COURT:** What does "associated with your Google
15 account" mean? I mean, I may have this wrong, and plaintiffs
16 can correct me, but I thought the plaintiffs were suggesting
17 that some of the information at issue here does link up with
18 certain devices. I know you say it's all anonymized and nobody
19 can figure out exactly who is involved here, but it does link
20 up to -- there's some information that links up to particular
21 devices, doesn't it? And those devices are then connected to
22 people, right?

23 So why is it that it -- you say it can't, as a matter of
24 law, because we're in summary judgment, and you're saying
25 there's just no dispute about it, that there is no way that the

1 information that's at issue here can be in any way associated,
2 and that was the word you just used, with individuals.

3 **MS. SANTACANA:** Well, again, the question is not could
4 it be associated with your personal information or could it be
5 associated with your Google account. This is not a case about
6 the theoretical conduct Google could have engaged in.

7 **THE COURT:** Why not? I mean, if you are collecting
8 information that could be used for that, why wouldn't that be
9 relevant in this case? You're saying it has to have been used
10 in that fashion to link back up to individuals?

11 **MS. SANTACANA:** Of course, Your Honor, because
12 otherwise it's a theoretical concern. So Google --

13 **THE COURT:** There may be value -- plaintiffs may view
14 that they have, class members, that there's value in that
15 information because it could be used in that fashion.

16 **MS. SANTACANA:** That may be the case, but that doesn't
17 mean that Google has engaged in an intentional invasion of
18 privacy or a violation of the CDAFA.

19 So if we're looking at the legal claims in question,
20 Google actually has to engage in invasive conduct. The fact
21 that it could happen one day if a bad actor circumvented
22 Google's protections --

23 **THE COURT:** But I think you're looking at it from the
24 wrong perspective. It's not what theoretically could happen or
25 not. It's what information is being -- is being accessed.

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1 You're saying you are telling the user nothing that can be
2 associated with you is being collected, and now you're sort of
3 saying, well, theoretically, if it is used in a particular way
4 it could connect up to an individual user.

5 **MS. SANTACANA:** No, Your Honor. I'm actually -- I'm
6 not saying either of those things.

7 **THE COURT:** Okay.

8 **MS. SANTACANA:** So Google's WAA control doesn't say
9 what -- the way you just phrased it. What it says is give us
10 permission to save data in your Google account. The question
11 is did Google save it in your Google account or not.

12 Now, what Google -- and I think it's undisputed that
13 Google isn't saving it in your Google account. That's why five
14 times in their brief they put an ellipsis in that phrase rather
15 than actually use it, because they don't want to focus the case
16 on that.

17 It is undisputed that Google doesn't save it in your
18 Google account and doesn't associate it with any reasonable
19 definition of personal information. In fact, the California
20 legislature has in the CCPA already embodied this idea that you
21 can de-identify and pseudonymize data by attaching it to an
22 identifier that is randomly associated and that is not
23 connected to a person's identity. That's the representation
24 that Google made. That's the only representation that Google
25 should be responsible for here today, because that's the basis

1 of the case.

2 I think to some extent what Your Honor is asking is more
3 of a policy question. But the specific disclosure in the
4 button says "saved data in your Google account."

5 Now, the second part of your question was, you were saying
6 our argument is, well, it could be, but it hasn't been. That's
7 not our argument. Our argument is that it cannot reasonably be
8 linked. Why? Because Google -- first of all, Google created
9 the system that exists, right? This system is there because
10 Google created it. It has a privacy policy that discloses that
11 it will collect certain information, and it has this button
12 that says what it will and won't do with that information,
13 right? In this case app activity data.

14 That same system prohibits the connection from one to the
15 other. And there's no allegation in the case that there's a
16 data breach or that Google sold it to a third party. None of
17 that is in this case. There's no evidence of that.

18 So what we're talking about is Google creates two buckets,
19 and it successfully kept the buckets apart. In the words of
20 their expert, Google has attempted, with the best of
21 intentions, but who knows maybe one day they turn evil. That's
22 what he says in his deposition: "Maybe one day they turn
23 evil."

24 But right now, looking back for past damages, the two
25 buckets have remained separate. The system worked.

1 And I want to be very clear about this. If the plaintiffs
2 had identified any example of Google failing at keeping those
3 buckets apart, of Google connecting this data, quote,
4 associating it with personal information under any reasonable
5 definition, they would be jumping up and down screaming about
6 it in their brief; they would be jumping up and down
7 screaming -- I don't know if Mr. Boies jumps up and down and
8 screams, but somebody would be doing that. I don't think
9 there's any evidence of that. There's -- it's not in their
10 brief. They never found any instance of that ever happening.

11 Instead, what they did was they theorized that there are
12 concerns within Google or within their expert's opinions that
13 it could be done by a bad actor, one day, if Google's systems
14 were to change.

15 This is a case about Google's class-wide conduct. It is a
16 case about past damages, and so in the past Google didn't do
17 that.

18 **THE COURT:** Okay.

19 **MS. SANTACANA:** The other point I want to make about
20 consent, Your Honor, before I turn to harm, is that when we're
21 talking about the description of WAA, at the motion to dismiss
22 stage Your Honor held that the definition of Google account was
23 nebulous at best.

24 I want to be -- I want to read to you what Your Honor was
25 evaluating at the time, because I think it is lost in the

1 briefing. The opposition to the motion to dismiss the first
2 amended complaint, parroting the allegations of the first
3 amended complaint, was arguing that Google was associating,
4 quote, that data with Google's preexisting profiles thereby
5 enriching those profiles with data Google was not supposed to
6 have, and that Google services target users based on this data.

7 Now, it was in that context -- and there's more in the
8 brief, but it was in that context, this idea of a shadow,
9 quote, not your Google account, that Your Honor said, well,
10 "save to your Google account" is nebulous if what you're saying
11 is there's some shadow account that you're keeping that just
12 doesn't have your name on it. That's not the case anymore.
13 They were unable to find any evidence that Google ever
14 personalized advertising or built marketing profiles using this
15 data.

16 What they found, which we told them from the beginning in
17 an interrogatory response four years ago, was we do keep
18 records that we serve ads. That's it. We have a randomly
19 assigned string of characters. It is not connectable to a
20 person's identity, and it indicates that that device, that
21 string of characters was served and added a particular time so
22 that we can charge advertisers for it.

23 And they come and they say, well, the fact that you're
24 keeping the receipt means that you're using the WAA-off data.
25 And since you're using the WAA-off data, if I were to disable

1 you from keeping the receipt, you couldn't charge, and so every
2 single penny of what you've charged needs to be disgorged.
3 That's where we are now.

4 And so when we're talking about the scope of withdrawn
5 consent, the question has to be could a reasonable user believe
6 that when they turn WAA off, they not only disabled Google from
7 saving personal information, but they disabled Google from
8 saving a non-personal list of service of ads that is basically
9 just a ledger of receipts.

10 And our argument is there's no reasonable user who
11 could -- there's no reasonable reading of the language to
12 support that. There's no phrase in the privacy policy or in
13 the description of WAA to support that view. And without a
14 textual hook, I think on the language by itself Your Honor can
15 grant summary judgment.

16 Turning to harm, Your Honor, these two claims require --

17 **THE COURT:** Going back for a second to consent.

18 **MS. SANTACANA:** Sure.

19 **THE COURT:** And this is maybe just a variant on my
20 first question, but effectively what I understand the
21 plaintiffs to say is that the -- a reasonable consumer is left
22 with the notion that nothing associated with me -- if they
23 exercise the affirmative decision with respect to the buttons
24 and say I want out of this -- that nothing associated with me,
25 anonymized or otherwise, anything that you have retrieved about

1 me is not going to be shared, that that is their reasonable
2 understanding.

3 And you've gone through -- and I understand it -- a fairly
4 sophisticated analysis of what, you know, the material that
5 ultimately may flow to the advertisers or whatever really is so
6 generalized as to be almost not, in a sense, associated with
7 the individual. But from the individual's perspective don't
8 you think that at least it is fair that the user thinks nothing
9 associated with me, be it anonymous or otherwise, is going to
10 be shared? Isn't that a fair understanding of what you think
11 the reasonable consumer thinks when they are electing those
12 buttons?

13 Now, you could say yes to that and say we still win. But
14 isn't that fair?

15 **MS. SANTACANA:** No, Your Honor, it's not fair.

16 **THE COURT:** Okay. And you really then think that
17 they -- that the minutiae of your privacy policy is what the
18 reasonable consumer should understand all of the -- and if they
19 have a question, they can go ask and this, that, and the other
20 thing -- that's really your position then, that the idea that a
21 consumer walks away with the notion that they're just telling
22 you don't, don't share anything at all about me, that that is
23 just -- they're wrong, they, you know, it's on them to
24 understand it more. I mean, what is it?

25 **MS. SANTACANA:** So I have several responses, if I may,

1 Your Honor.

2 **THE COURT:** Okay. It was a rambling question, so
3 that's fair.

4 **MS. SANTACANA:** So first I want to make sure that we
5 are taking the appropriate 30,000-foot view on this question,
6 okay?

7 Google is a big company. It has lots of privacy buttons,
8 about 13 of them, I think. Data comes in from various sources
9 just like the WAA button says, as well as some other buttons
10 that control other sources of data. It has a billion users
11 worldwide, and it speaks to those users, or some subset of
12 them, effectively every day through a variety of products - all
13 of which are free and are self-serve, so anybody can come,
14 agree to the thing, and start using it.

15 So Google has to find a way to explain technology, which
16 we can all agree is sometimes not that easy to explain to a
17 reasonable user as best as it can. And I don't think that a
18 half billion-dollar jury trial is called for every time Google
19 fails to use the perfect words to describe itself.

20 So when you're talking about the user who thinks "I told
21 you nothing associated with me, whether personal or anonymized
22 should be saved," my question is based on what? Which language
23 are you relying on, Reasonable User, to believe this?

24 Because when I look at the language, that is not what it
25 says. And it's not that it's not what it says in some

1 legalese --

2 **THE COURT:** Let me stop you there. That's where --
3 and I understand you -- I know what your answer was going to
4 be. But we are at summary judgment, so what you think is a
5 reasonable interpretation is a perfectly legitimate analysis on
6 your part.

7 But what you really have to convince me of is that no
8 reasonable person could have a contrary view, because unless
9 and until you do that -- and I understand you say, well, the
10 specter of every time -- I forget your language -- every time
11 we're at a point that we've reached here, that the alternative
12 for Google is a bazillion-dollar trial -- well, I'm not sure I
13 entirely buy that. There are places along the path that
14 they -- it doesn't automatically mean you go from point A to a
15 bazillion-dollar judgment.

16 But going back to what I'm saying, you know, am I right
17 that I have to effectively say your view is not only
18 reasonable, but it is the only reasonable view?

19 **MS. SANTACANA:** No, I don't think you have to say
20 that.

21 **THE COURT:** Okay. Why not, on summary judgment?

22 **MS. SANTACANA:** Because the standard on -- what we're
23 talking about is the written word. And so generally in this
24 area of the law, although a recent Ninth Circuit panel noted
25 repeatedly that actually it's very unclear what the standard is

1 in California on privacy consent. But mostly we look at
2 contract principles to understand what the written language is
3 supposed to mean.

4 Here, I'm looking at the language -- and Your Honor has
5 done this at summary judgment before -- you know, *Pacific*
6 *Drayage*, California contract law. It's black letter law.
7 We're going to start with the plain language. Does the plain
8 language support reasonable -- is it reasonably susceptible to
9 the plaintiff's view of it? That's the question. It's not
10 that I have the only reasonable view of it. I might be able to
11 give you 15 reasonable views of the language, but if none of
12 them is reasonably susceptible to the plaintiff's view, then
13 the plaintiff's lose. That's the standard.

14 **THE COURT:** Okay.

15 **MS. SANTACANA:** And so when I look at this language --
16 it's the paragraph at the top of the WAA button that they have
17 in their complaint -- this is what it says, and I'm just going
18 to read it because I'm going to make sure that we're focused on
19 the plain language: "The data saved in your account helps give
20 you more personalized experiences across all Google services.
21 Choose which settings will save data in your Google account"
22 and then it says Web and App Activity, and then there's some
23 more words about all of the different types.

24 The user that you're positing who says, well, I thought
25 that button means nothing, it's as though all Internet

1 connection between my -- google android device, by the way,
2 this is an android device -- my Google android device and
3 Google is severed completely, is not realistic or reasonable.
4 No -- it's just not reasonably susceptible to app use.

5 So now we're at, okay, fine, so we agree with that.
6 Obviously, the android device has to communicate with Google
7 somehow about some thing. Google is going to save some of
8 that. And the question is fine then what's the scope? Now
9 we're talking about scope. And does it include marketing
10 profiles? Yeah, maybe. I don't think we would get summary
11 judgment on that. But there are no marketing profiles that
12 Google is saving when WAA is off.

13 Does it include an anonymized list of which ads were
14 served which Google uses solely for the purpose of charging
15 advertisers? I don't think a reasonable user -- I don't think
16 there is a reasonable reading of this language that would say
17 that. But if there were, at a minimum we would need to click
18 on the "learn more" button and look at the privacy policy.

19 And the privacy -- you said minutia, I really -- I don't
20 agree with that. The privacy policy over and over and over
21 again draws a conceptual distinction, as best as Google can
22 with a billion users talking to them every day, constantly
23 changing privacy policy, but over and over they're saying
24 there's such a thing as personal information, and there's such
25 a thing as non-personal information, and they do their best to

1 say personal information, non-personal information are
2 different. You can control this one, you can't control that
3 one.

4 So the necessary implication is there's something I can't
5 control, and does ads recordkeeping fall under this one or that
6 one, is the question. Is it reasonably susceptible to the view
7 that it's the same as a marketing profile? No. I really -- it
8 doesn't fit. But if Your Honor doesn't agree with that, then
9 we have to look at harm.

10 And on the question of harm, as I said, there isn't a
11 single piece of evidence in the case that Google ever
12 associated this ledger of ad receipts, or for that matter the
13 analytics data that's in this virtual safe deposit box for
14 analytics customers with a person's identity, when WAA was off.

15 And because there's no evidence of that, even if we assume
16 that the expectation of privacy that is given rise to by the
17 WAA button includes anonymized data, the question is, well, is
18 it highly offensive to keep a receipt for the ads you serve and
19 only use it for that? Is it highly offensive or does it cause
20 actual damage or loss, which is an even higher bar in CDAFA.
21 It has to be actual damage loss. Does it cause actual damage
22 or loss for Google to keep a record of what it does when it
23 services an advertising account?

24 Under both of the remaining claims in the case, there's no
25 CIPA claim, there's no UCL claim, these are --

1 **THE COURT:** Yep.

2 **MS. SANTACANA:** -- these claims require a showing of
3 real harm.

4 Where the plaintiffs have landed in their opposition brief
5 is to rely on things like battery depletion and emotional
6 distress. They say the harm from the invasion of privacy
7 itself satisfies the harm requirement of invasion of privacy.
8 That's not true. It's not true.

9 Now, the reason this doesn't come up in an invasion of
10 privacy tort case very often is because an individual plaintiff
11 can say you hurt my privacy and it caused emotional distress.
12 At class cert. they disclaimed any reliance on that.

13 So then they say in the opposition brief: Well, what
14 about batteries? My battery is being depleted. Under *Comcast*
15 *versus Behrend*, the Supreme Court case on class action damages,
16 the damages model they present at class cert. has to be tied
17 directly to the way in which they say the conduct gives rise to
18 liability. The liability theory must match the damages model.
19 There's no damages model on battery depletion, so they can't
20 proceed on that. We' have to redo class cert., and honestly I
21 think they're precluded at this point. It's been four and a
22 half years.

23 So then we have to talk about the damages models that they
24 do have and this question of disgorgement.

25 So, again, the theory of the case on disgorgement is if

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1 the restaurant serves you pancakes and you pay for the
2 pancakes, and it keeps a receipt and I told them no, you can't
3 keep receipts, then the entirety of what's paid for the pancake
4 must be disgorged, because you couldn't possibly charge for the
5 food if you didn't have the ability to keep the receipt.
6 That's the argument. The receipt is the WAA-off data.

7 Under *TransUnion*, which postdates the *Facebook Internet*
8 *Tracking* case, that is not sufficient to satisfy the statutory
9 standing requirement under a statute like CDAFA, and it's not
10 sufficient to the actual harm. The fact that the receipt may
11 have business value to Google does not amount to a harm to the
12 user.

13 And what's interesting is there's no actual testimony in
14 the case from a user, like a plaintiff or one of the five who
15 withdrew, that says I'm hurt by the fact that you kept a
16 receipt for advertising. Each plaintiff, what they testified
17 to, was: I am hurt by the fact that you targeted advertising
18 to me. Because they were under the false pretense that that
19 was actually happening.

20 So the first person to ever identify the ad recordkeeping
21 activity as a problem was a lawyer on the plaintiff's side. No
22 employee of Google ever brought it up, no plaintiff ever
23 brought it up, nobody has ever brought it up, because it would
24 never occur to anybody that that could cause harm to a person
25 or be highly offensive or breach social norms.

1 The cases on offensiveness and harm, including Your
2 Honor's own cases, were evaluating, the ones we cite in the
3 papers, were evaluating data collection that was far more
4 detailed than this. Your Honor decided the *Williams* case in
5 2018 and the *Katz-Lacabe* case last year; there's also the
6 *Williams versus DDR Media* case by Judge Illston, the *Low versus*
7 *LinkedIn* case by Judge Koh, the *Hammerling* case, which was
8 affirmed by a panel of the Ninth Circuit on March 5th, and the
9 *McCoy* case, which is related to the *Hammerling* case, which was
10 decided in 2021 by Judge van Keulen. All of those cases
11 evaluated data collection that included information, just to
12 use *DDR Media* as an example, information like every keystroke
13 entered on a web site associated with an identifier that was
14 de-identified.

15 And even there each one of those judges, including Your
16 Honor, said this isn't highly offensive; this is routine,
17 commercial behavior or not even, because it's de-identified.

18 The California legislature has passed a law now, since
19 this case was filed, the amendment to the law that says
20 de-identifying is a legitimate way to protect data.
21 Pseudonymization is a legitimate way to safeguard user data,
22 which is what Google is doing. So if we're looking for clues
23 as to what is or is not highly offensive, that's another one.

24 What is not in the papers is any case that comes anywhere
25 close to the facts of this one where it is found to be highly

1 offensive. And there's two cases in our reply brief I want to
2 call your attention to if you're looking for binding authority.
3 *Eichenberger versus ESPN* is a Ninth Circuit case from 2017.
4 That case is actually a lot like this one. In that case what
5 was alleged was that a Roku, which is a smart TV appliance for
6 televisions, a Roku was recording the serial number of the
7 device and the names of the videos that the user was watching.

8 Here, we're not even doing that. We're recording the
9 serial number, the device, and the randomly served ad, which
10 the user has no real private expectation in any way. I mean,
11 even if we were to proclaim from the rooftops that a particular
12 person was served a particular ad, it's not clear to me that
13 there's anything private about that.

14 But in any case, Roku is the device, serial number, and
15 the names of the videos the user watched. And the Ninth
16 Circuit said that's not highly offensive. That's routine,
17 commercial behavior.

18 The second one is the *Zynga* case in 2014, which on these
19 facts is much more like this case than the *Facebook Internet*
20 *Tracking* case from 2020, which is the one Your Honor was
21 following at the motion to dismiss stage when the allegation
22 was that we were keeping browsing histories to personalized
23 advertising.

24 The last thing I'll say, Your Honor, is about intent. And
25 this one is I think near and dear to my heart as somebody who

1 has worked on this case for so long.

2 Google -- the evidence in this record is that Google had
3 an internal understanding of what the button was supposed to do
4 and it followed it. It set up all these systems to make it
5 happen. We had 14 people from Google, former and current
6 employees testify, all said the same thing.

7 These systems were put in place to safeguard user data and
8 user privacy. That was Google's subjective understanding of
9 what it was attempting to do. The two claims that remain here
10 are not strict liability claims. They require intent. They
11 require the intent that is missing when you take into account
12 just two facts.

13 Google summarized its own understanding pretty well about
14 what it was trying to do. It may not be perfect. It may not
15 be enough for Your Honor to grant summary judgment on consent.
16 But they did summarize it in a way that is perfectly consistent
17 with what they were trying to do, and they did it at a massive
18 cost, leaving much money on the table that could have been
19 used, that could have been made if they had personalized
20 advertising with this data, which is precisely what the
21 plaintiffs alleged we were doing, falsely.

22 So if Your Honor is to say that a reasonable juror could
23 find intent, my question to the plaintiffs would be based on
24 which fact?

25 And for them, what they say is, well, there's employees

1 who understood that WAA was confusing in one way or another
2 way. What I want to be really clear about, Your Honor, is not
3 one of them, not one of them ever thought about this. They
4 weren't thinking about Google keeping a record of which ads it
5 serves or which conversions are made. When they said that it
6 was confusing, one of them said it was confusing because it
7 was -- the dutch translation wasn't very good. Another one
8 said it was confusing because it wasn't clear what it means
9 when the WAA button is on.

10 The fact that it is sometimes confusing to some people
11 about something else does not manifest intent on the part of
12 the company, which has spent millions to do exactly what it
13 thought it had said it was going to do. It doesn't manifest
14 corporate intent that there is this other set of people,
15 individuals who are a little unclear about other aspects of the
16 button.

17 So with that, Your Honor, I'll yield.

18 **THE COURT:** Well, just while you're on intent, and,
19 again -- well, this doesn't really call into question what
20 you've just said, but as a general matter I think you would
21 agree granting summary judgment on intent is disfavored, if you
22 will.

23 **MS. SANTACANA:** Agreed. Completely.

24 **THE COURT:** You think this case on the intent issue is
25 so strong on your side that it's subject to summary judgment.

1 **MS. SANTACANA:** I -- I don't -- it's incredibly strong
2 because, as I said, the company put its weight behind its
3 subjective intent, and its subjective intent is consistent with
4 the language on the button and in the privacy policy. So there
5 isn't really a hook to say, oh, the company is trying to --

6 Like, for example, if the plaintiffs had demonstrated that
7 the company was secretly profiting off this data by using it to
8 target advertising, that would be a very different case.
9 That's more like the case Your Honor let through at the Rule 12
10 stage.

11 Google isn't doing anything with the WAA-off data. It is
12 using it to keep a record of the ads that it served. It's
13 servicing analytics customers' accounts for free. It is not
14 using the data to enrich itself or understand better its own
15 users.

16 So where is the fact that's giving rise to even the
17 plausible thought that there is intent. It is disfavored.

18 Last week, Your Honor, Judge Chhabria held at the motion
19 to dismiss stage that the plaintiffs had failed to allege, in
20 an analytics case, had failed to allege enough facts to meet
21 the intent standard, because Google publicly says we are not
22 going to use data for health-related advertising. This is in
23 the *Doe versus Google* case, which we can submit to Your Honor
24 if you're interested. And the plaintiffs had no basis to argue
25 that that was a lie.

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1 Here, it's the same thing. Where is the basis to say
2 Google had secretly had a different intent that was sufficient
3 to give rise to an intentional tort for invasion of privacy,
4 which is typically reserved for some pretty serious conduct, or
5 a violation of a state anti-hacking statute.

6 I agree with the plaintiffs that the intent to do what you
7 set out to do can sometimes be enough. But when -- but here,
8 the intent has to be read in the context of the disclosures
9 that Google made. So Google says I'm going to do this, and it
10 does that. And the plaintiffs say, well, I didn't totally
11 understand what you meant. Nobody else has ever taken the same
12 interpretation as the plaintiffs. Does that really give rise
13 to liability?

14 **THE COURT:** Okay. I'll give you an opportunity to
15 respond, because you're the moving party, but I'll look to the
16 plaintiff, Mr. Boies.

17 **MS. SANTACANA:** Thank you, Your Honor.

18 **MR. BOIES:** Thank you, Your Honor. And may it please
19 the court, my name is David Boies.

20 Let me begin with the issue of intent, Your Honor,
21 because --

22 **THE COURT:** Aha! Some materials.

23 **MR. BOIES:** These are things I'm going to be referring
24 to, but they're, for the most part at least, not demonstrative,
25 so they're the actual evidence. For example --

1 **THE COURT:** Okay. All right.

2 **MR. BOIES:** -- I'm going to point you to the
3 beginning.

4 If we could go to chart number 2, because I want --

5 **THE COURT:** Well, I won't quibble with you, but it --
6 we have things like statements that look like Power Points and
7 things.

8 **MR. BOIES:** There are some Power Points.

9 **THE COURT:** It's fine. I gave my spiel. You know my
10 general view of this for motion argument, but I'm not
11 precluding you from using it. So go ahead.

12 **MR. BOIES:** Thank you, Your Honor. And I'm not
13 relying -- I'm not offering anything here except the actual
14 evidence.

15 **THE COURT:** Okay.

16 **MR. BOIES:** But the actual evidence is really critical
17 here, because you've heard a lot about what they think their
18 evidence is going to show. But, respectfully, since this is a
19 summary judgment motion and they're the moving party, what's
20 really relevant is the evidence we're relying on.

21 The question is not whether they have evidence from which
22 they can make arguments. The question is whether we have
23 evidence that creates a triable issue of fact. And so you've
24 got to look at what the actual words are, because we don't
25 think the actual words are what they were saying the words are.

1 I mean, for example, they said: All we ever promised to
2 do is not save personal information. That's not what their
3 documents say, and I'm going to take you through it.

4 **THE COURT:** Well, I assume your position is even if
5 that was --

6 **MR. BOIES:** Even if that was the case, we think they
7 save personal information because, as they have said
8 themselves, if it can be reasonably -- could be, could be, not
9 it were, but could be reasonably linked, that's personal
10 information. That's what the California statute says. That's
11 what their definition says. And there's no doubt here that
12 they can do it. Their expert admits it. Our expert says so,
13 and their internal documents say that they do it.

14 So they may say that they have these safeguards to prevent
15 people from -- bad actors from doing it. But there's no
16 dispute in the record -- there's certainly far more than
17 necessary to create a triable issue of fact -- that they could
18 reasonably link this --

19 **THE COURT:** So what do you say to Mr. Salcedo's (sic)
20 point that until they do it, no harm, no foul?

21 **MR. BOIES:** Because, Your Honor, what they've done is
22 they've collected this very personalized information. And if
23 you look at our expert report, Mr. Schneier, paragraph, I think
24 it's 89 --

25 Let me see number 73, because I think I've got it. I

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1 think I quoted it. It's page 73 of what I've given you, I
2 think.

3 Can we put that up? No? Maybe. Can we put up number 73?

4 **THE COURT:** Well, I'm on your -- the Schneier report,
5 73.

6 **MR. BOIES:** Yes.

7 **THE COURT:** It's paragraph 89.

8 **MR. BOIES:** Exactly.

9 **THE COURT:** Okay.

10 **MR. BOIES:** And if you look at that, you see the kind
11 of information that is being collected. Now, they may say they
12 don't use that information. They may say -- although I think
13 the evidence is that they use at least some of that
14 information. But this is the kind of information that is being
15 collected, and that is exactly the kind of information that we
16 think is highly offensive to people, particularly when they're
17 told that information is not going to be collected.

18 Now, in addition, unlike the cases that they cite --

19 **THE COURT:** But, actually, and this is jumping around
20 with you a bit --

21 **MR. BOIES:** Yeah, sure.

22 **THE COURT:** You know, the nature of the information, I
23 understand what you're saying, could be objectionable to a
24 particular class member in terms of the nature of the
25 information. But if it is ultimately anonymized, then why

1 should they care?

2 **MR. BOIES:** Well, I think there are two reasons.
3 First, they don't really claim it's anonymized. They say
4 pseudonymized.

5 **THE COURT:** That was a new word to me, but, okay.

6 **MR. BOIES:** It's a new word to me, too, Your Honor.
7 I'm actually told they didn't invent it, that it existed
8 before, but they've certainly adapted it to a new use.

9 And the reason they don't say anonymized and they say
10 pseudo-anonymized is because this is tied to the device
11 identifier, and the device identifier can be tied to a person.
12 Even if the device identifier could not be tied to a person,
13 that device identifier is still a very personal identification.

14 For most people today their smart phone that they carry
15 around is the closest thing they have to their diary. It
16 contains all of their private information. It is what they use
17 to make purchases, to have their -- to have their personalized
18 information tied to their personal device is itself I think
19 something that people are -- would be concerned about.

20 But in addition to that, there's more, because they can
21 and do sometimes link the personalized device identification to
22 the name. So what they've done is they've taken this
23 information, and it could be linked to the person. That itself
24 is going to be concerning to people.

25 I mean, suppose that somebody puts a camera in a changing

1 room at a retail store, and they don't tell anybody so they
2 don't know what's happening. They collect all this
3 information. And suppose they blur the faces. Does anybody
4 think that people wouldn't find that offensive, particularly if
5 they say they're not doing it?

6 The thing that distinguishes their cases -- well, several
7 things that distinguish their cases, but one of the things that
8 distinguish their cases, is that here, Google told people they
9 weren't going to do it. And they didn't just say we're not
10 going to collect your personal information. What they say is,
11 for example, in our Exhibit 36, in the summary judgment
12 submissions, screen 1. "Activity Controls. Choose the
13 activities and information you allow Google to save." It
14 doesn't say choose the personal information. It says choose
15 the information.

16 And they keep talking about Google account. There's no
17 reference to Google account on this first screen.

18 There is a reference to Google account on the second
19 screen, screen 2. But, again, no reference to personal
20 information. It says in order to -- you've got to check a box
21 in order to "include Chrome history and activity from sites,
22 apps and devices that use Google services." They're talking
23 about all the app activity. All of the app activity is saved,
24 collected, and what they're telling people is that we're not
25 going to do it if you check this box or unless you check this

1 box. If you've got this turned off, we're not going to collect
2 the information.

3 And the reference to Google account here is just -- is
4 choose which settings will save data in your Google account.
5 Google account is not defined there. And if you go to the
6 definition -- what they call the definition, it's not really a
7 definition, it's just describing some of the stuff that's in
8 the Google account.

9 And then if you go to screen 3, okay, it says:
10 "Information about your browsing other activity on sites, apps,
11 and devices that use Google services," and then it says: "To
12 let Google save this information," this information about the
13 app activity. "To let Google save this information, Web and
14 App Activity must be on." It doesn't say anything about we're
15 only going to save -- we're only going to not save personal
16 information. It's talking about app activity. "To let Google
17 save this information, Web and App Activity must be on."

18 Now, let me go to the next page which is a help page, WAA
19 help page, screen 3. This is docket 315-17, at 2. It says at
20 the beginning "Find and control your Web and App Activity."
21 And it says "Web and App Activity saves your searches and
22 activity from other Google services in your Google account."
23 Nowhere does it say or suggest that they're going to save it
24 anyplace else. The suggestion that, well, we said we are not
25 going to save it in your Google account, but that doesn't mean

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1 we're not going to save it someplace else.

2 This is a statement to people that the only place they're
3 serving it is the Google account. So this idea that, well, we
4 reserve the right, even though we didn't say it, we reserve the
5 right implicitly that we could save this information, this app
6 activity stuff someplace else unless it was personal data.
7 There's no support for that in the actual documentation that's
8 here.

9 And then it says -- it lists all the -- "When activity is
10 on, you can include additional activity like," and it lists a
11 whole bunch of stuff. And then it says "Information about your
12 browsing and other activity on sites, apps and devices that use
13 Google services to let Google save this information, Web and
14 App Activity must be on."

15 That's what they're saying, and that's what they're saying
16 in the specific stuff.

17 Now, in the -- they talk about their general privacy
18 policy. That general privacy policy, when you print it out,
19 goes on for 27 pages. Now, there's stuff in there that they
20 can quote, but there's also stuff in there that they ignore. I
21 mean, for example, and I've got an extra up here, and this is
22 from pages 2 and 3 of Exhibit 8. Exhibit 8 is the entire
23 policy. It begins by: "When you use our services, you're
24 trusting us with your information. We understand this is a big
25 responsibility and work hard to protect your information and

1 put you in control."

2 And then it goes on to say later on: "And across our
3 services, you can adjust your privacy settings to control what
4 we collect and how your information is used."

5 And then again it later on it goes on to say: "The
6 information Google collects, and how that information is used,
7 depends on how you use our services and how you manage your
8 privacy controls."

9 There isn't anything here that says yes, but this only has
10 to do with your personal information. Other stuff we always
11 collect, and you can't do anything about it.

12 They could have very easily put in here: By the way,
13 except for personal information, whether your web activity is
14 on or off, we're going to collect all that information and log
15 it in. They could have said that.

16 And interestingly, in their brief they quote -- they
17 haven't got this quote about their ad personalization, and they
18 point out that people can opt out of ad personalization. And
19 then they say, and this is on page 13 of their opening brief,
20 they quote something that's in their privacy provisions:

21 Quote, even if you opt out of ad personalization, you may still
22 see ads based on such factors as your general location derived
23 from your IP address, your browser type, your terms of search.

24 They could have done that with app activity. They could
25 have just as easily said even if you turn off WAA, we may still

1 collect the following information. They could easily have said
2 that. They didn't say that. In fact, what they said is that
3 for us to collect this information, to let Google save this
4 information, Web and App Activity must be on.

5 Now, on the question of intent, you notice counsel didn't
6 go through any documents, internal Google documents talking
7 about intent. I want to go through some of those. Let me
8 start at my number 12.

9 This is an internal Google email, 2019, December, from a
10 Google executive. "Isn't WAA-off supposed to not log at all?
11 At least that is what is implied from the WAA page." This
12 isn't counsel's argument. This isn't counsel making it up.
13 This is contemporaneous Google.

14 Let's go to the next page, November of 2019, a different
15 Google software engineer and copying a whole lot of other
16 people: "I think teams should not use user data at all if WAA
17 is off. It's what I would think most users expect." This is
18 not counsel trying to put a gloss on what they say. This is
19 Google's internal statement.

20 Now, not only that, they did a study --

21 **THE COURT:** Let me first stop you on the two that
22 you've mentioned.

23 **MR. BOIES:** Yeah. Yes.

24 **THE COURT:** What was the context in which these
25 statements occur? Are there responses to the statement, and

1 who are these people in the hierarchy?

2 **MR. BOIES:** Sure. These are software engineers.

3 **THE COURT:** Okay.

4 **MR. BOIES:** And these are people who, in varying --
5 I'm going to go through a number of these people, but a number
6 of these people are people who are related to the software
7 engineering, they're related to trying to make the statements
8 correct, and they're trying to figure out what they can use.
9 These are people who see this information and they're
10 questioning whether they can really use this information.

11 And Google says, well, these people didn't know what they
12 were talking about; they were outliers. They can argue that to
13 the jury. But certainly at the summary judgment stage, the
14 fact that we have these internal documents, at a minimum, you
15 know, creates a triable issue of fact. And there are a whole
16 lot of them.

17 And if we go to the next page, there's Exhibit 3 in our
18 summary judgment submission. This is a report. They did a
19 study. They said: "In this study we want to get an
20 understanding of users' mental model of the control hierarchy
21 and see if users have a correct understanding of the
22 relationship between the different controls on the page."

23 So they're doing internal research. This is in April of
24 2020.

25 And research question number 1. "WAA: What do users

1 expect turning WAA-off to mean?"

2 Answer, next page:

3 "All participants expected turning WAA toggle off to stop
4 saving their activity."

5 Now, they're going to say, well, there weren't very many
6 people in the survey. Google picked the number of people that
7 were in the survey. This is what Google was internally relying
8 on.

9 Now, after that, after that they decided to do a more
10 detailed study, and this is Exhibit 41, and this is going to be
11 research how they -- about how the design of a page impacted
12 reading behavior. And they developed a hypothesis they were
13 going to test. The hypothesis was based on the prior study,
14 okay? The hypothesis -- and this is June of 2020. The
15 hypothesis was: "Most respondents will believe that turning
16 off WAA will result in no data being collected from their
17 activity."

18 That's what they hypothesized their user -- that's what
19 their intent was. That's what they internally believed.

20 Now, we never got the answer to this --

21 **THE COURT:** Well, now, stopping on that, it then goes
22 on, there's a sentence that says "being collected from their
23 activity and no personalization from Google products and
24 services."

25 **MR. BOIES:** Both. Both.

1 **THE COURT:** Well, that's my question.

2 **MR. BOIES:** It's not --

3 **THE COURT:** You are distinguishing between the two.

4 **MR. BOIES:** Yes.

5 **THE COURT:** Okay.

6 **MR. BOIES:** As Google did.

7 And Your Honor makes a very good point. They didn't say
8 most respondents believe there will be no personalization in
9 Google products. They said: "Most respondents believe no data
10 being collected from their activity, and no personalization."
11 So they believed that neither of those things are happening.
12 And, again, they've got some arguments on this, but those are
13 for the jury.

14 Now, I want to go on next to page 33 in the evidence I
15 want to go through.

16 This is another -- this is Mao Exhibit 2 in our summary
17 judgment submission. This is another software engineer --

18 Oh, before I do that, though, before I do that, I just
19 want to remind the court in our -- in our papers, Mao
20 Exhibit 4, and I think 47, we have quotes from Google's CEO
21 testifying at a House Judiciary Committee hearing in
22 December 2018, and I think I've got -- yeah, yeah, here it is.
23 Yeah, number 18. They put it up.

24 I'm not going to go all the way through it, but at the end
25 it says: "We are pretty explicit about data which we collect

1 and we give protections for you to turn them on or off."

2 There's nothing here about saying we give you control of
3 your personal information, but everything else we're going to
4 take. That's not what they were saying.

5 But now let me go to page 33. This is another internal
6 email, July 25, 2019. This is from another Google software
7 engineer: "The WAA and other controls imply we don't log the
8 data, but obviously we do."

9 He goes on to say: "I see how the wording here is very
10 deceptive."

11 He goes on to say: "The user has a false sense of
12 security that their data is not being stored at Google, when in
13 fact it is."

14 That's not something counsel is making up. That's what
15 Google is saying contemporaneously internally.

16 The same person: "We don't accurately describe what
17 happens when WAA is turned off."

18 Again at Exhibit 2, same person: "We need to change the
19 description."

20 If you go to chart 37, this is Mao Exhibit 59, at 46, a
21 different Google employee: "WAA - completely broken, no way
22 for the user to determine what this actually controls."

23 Mao Exhibit 64 on my chart 38, another Google employee,
24 July 14, 2020: "To me, it feels like a fairly significant bug
25 that a user can choose to turn off WAA but then we still

1 collect and use the data."

2 Now, throughout this there's no suggestion here, well,
3 they're only talking about personalized data. There's no
4 suggestion here that the data is just collected and then set it
5 aside and never used in any way. This is what they're saying
6 internally, Your Honor.

7 And, again, we can argue back and forth about the
8 significance of some of these people, but at a summary judgment
9 stage I respectfully suggest this has got to create at minimum
10 a triable issue of fact, and I think in front of a jury they're
11 going to have a hard time explaining some of these things.

12 **THE COURT:** Okay. Let's -- can you move for me to the
13 harm issue?

14 **MR. BOIES:** Sure.

15 First, this here is -- there is a market for the
16 plaintiffs' data, and that also distinguishes this case from
17 the cases they're citing.

18 **THE COURT:** And elaborate for me "the market."

19 **MR. BOIES:** Sure.

20 **THE COURT:** You've done it in the papers, and I think
21 I have a sense of where you're going with it. But humor me,
22 give me sort of a summary of what this "the market" is here.

23 **MR. BOIES:** Sure. For example, Google itself -- and
24 the Court in a similar case, *Brown against Google*, had the same
25 issue and relied on the fact that Google had itself created, in

1 effect, a market.

2 And if you go to my chart, 42, which is an excerpt from
3 the damages expert's report, and there was a survey that Google
4 did and it paid users \$3 a month to track their activity on
5 their mobile phones and tablets. And the Court in *Brown* held,
6 and we think pretty obvious, that when you're paying somebody
7 for the data, you're putting a value on that. And this is data
8 that with the WAA off, they took. It didn't belong to them.
9 Belonged to the user. They took it. They told the user they
10 weren't going to do it.

11 And the harm here is not just the harm of having your
12 personal data taken. We think that's enough. And one of the
13 things I think is significant is, and probably the farthest a
14 court has gone that requires standing, is *TransUnion*. And in
15 *TransUnion*, both the one thing that -- maybe it's not the only
16 thing, but certainly one thing, and there weren't very many,
17 that both the majority opinion and the dissent agreed on was
18 that you could go after intrusion of exclusion and privacy.
19 They said those were traditional kinds of harms that you could
20 go after. So that if you had an intrusion, you didn't have to
21 prove a monetary damage or something like that.

22 And as the court indicated earlier in prior opinions in
23 the class certification motion to dismiss, one of the things we
24 seek is nominal damages. And so nominal damages, when you have
25 as many class members as we have, can be a very substantial

1 amount of money.

2 So there are all sorts of harms here that are cognizable.

3 And in addition to the price of a data, in effect, the
4 value of the data that they improperly took, there's also a
5 disgorgement and unjust enrichment. And you have a -- and the
6 court will remember they had a *Daubert* challenge to that
7 calculation, which the court rejected.

8 Now, they'll be able to argue that we're asking for too
9 much. That's fair jury argument, and maybe the jury comes in
10 somewhere in between. But in terms of allowing us to get to
11 the jury, I mean, the court has already addressed the *Daubert*
12 challenges, as to whether this is an appropriate thing to
13 present, and it certainly is a quantification of the unjust
14 enrichment that they have gotten.

15 So you've got your cause of action, you've got your
16 liability, and you've got these means of measuring damages.

17 **THE COURT:** Well, to drill down a bit more on these
18 different avenues that you've identified for me in terms of how
19 we can -- how I can be comfortable to let the case go forward
20 with this damage, these damages being requested. First you say
21 there's a market for this, and that's reflected, as you've just
22 pointed out to me, in Google's own payment to effectively get
23 this material or a similar material. But that's -- isn't that
24 a bit of a one-off?

25 I mean, if Google itself wants to run some analyses on its

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1 operations, is that really -- you say they pay Google users \$3
2 a month. Does that really establish a market, if you will,
3 for -- that I could look to that says, well, okay, they've
4 quantified the value of this information. They've done kind of
5 a one-off study for their own internal operating. It's not
6 like anybody in the outside world is -- outside of Google is
7 paying this.

8 **MR. BOIES:** Well, actually, I think the evidence will
9 be that other people like Neilsen and -- I mean, I think our
10 expert goes through --

11 **THE COURT:** True. Okay. All right. Fair enough.

12 Then with respect to the emotional -- this is an issue
13 that, as you know, we just wrestle with over and over again
14 when we're talking about a class case. Can emotional distress
15 be effectively a damage theory on a class-wide basis?

16 I understand emotional distress is available for invasion
17 of privacy. No one can argue with you on that. And I know
18 we're not talking about class certification at the moment.
19 We've done that. But is it a viable -- if that were the only
20 basis you could point to for a damage recovery, emotional
21 distress, can that be done on a class basis?

22 **MR. BOIES:** Your Honor, I think if that was all we
23 had, I don't think we could get more than nominal damages on a
24 class-wide basis.

25 **THE COURT:** Okay.

1 **MR. BOIES:** I think in terms of quantification, I
2 think the emotional distress, other than nominal damages, which
3 I think we would be entitled to get, I don't think we could do
4 that on a class-wide basis.

5 **THE COURT:** Okay. So you're using that as the
6 predicate for the nominal damage recovery that you see?

7 **MR. BOIES:** I think that would be a predicate. That
8 would be one predicate.

9 **THE COURT:** Okay. And then in addition to that there
10 was a third avenue that you, I think, were identifying as a
11 damage approach.

12 **MR. BOIES:** And that was on the harm to the devices.

13 **THE COURT:** All right. Harm to devices. And that's
14 the battery degradation and the like, and I did have a case on
15 that issue, yeah.

16 **MR. BOIES:** Right. And now, and don't put this one
17 up. They want to -- this is quotes from something that they
18 want to have sealed.

19 But if you turn to page 49 in what you have --

20 **THE COURT:** Okay.

21 **MR. BOIES:** -- at the top you have our expert, and
22 that's not sealed. But at the bottom you have a quotation from
23 Google's internal documents that --

24 **THE COURT:** Well, I'll just say I don't -- looking at
25 this now just for guidance for the parties, I don't see any

1 basis to seal this, but that's a different question.

2 **MR. BOIES:** Yeah, I didn't see any basis either.

3 **THE COURT:** I know you're doing what you have to do,
4 but, go ahead.

5 **MR. BOIES:** But, I mean, this demonstrates, we think,
6 that Google recognizes that to the extent that it is doing --
7 collecting this data while WAA is off, that it has an effect.

8 Now, again, this is not something that we quantify. This
9 is something that is a basis for nominal damages, basis for
10 liability, but we can't quantify it on a class-wide basis.

11 You know, so we think there are those kind of -- we think
12 there are those kind of harms.

13 And if I could maybe just spend a moment on the
14 offensiveness --

15 **THE COURT:** Yes.

16 **MR. BOIES:** -- aspect of it.

17 **THE COURT:** I'll candidly tell you, I think that's --
18 that's a tough one for your side, because what I see is not
19 obvious to me where one could couper up a highly offensive
20 characterization.

21 **MR. BOIES:** Well, and I think that the offensiveness
22 comes from a number of standpoints. I mean, first, I showed
23 you the Schneier report where it goes -- has the kind of
24 information that is being, you know, and I just -- think about
25 it in any other context. If somebody was taking pictures of

1 you, you know, tracking you around physically for this kind of
2 information, it would clearly be highly offensive. And the
3 question is whether you can do -- and it's no less highly
4 offensive because it's done electronically.

5 Now, the question is whether they have permission to do
6 that, whether there's consent to do that. But if there's not
7 consent, if there's not permission, this is clearly, I suggest,
8 and certainly is a triable issue that this is highly offensive.

9 The second thing about it is that they ignored what they
10 were being told internally by their own software engineers
11 about what normal reactions were going to be, what normal
12 expectations were going to be. And it's not just a handful of
13 engineers. You'll see from this there are a lot of them. And
14 in addition to that they did studies. These were not random
15 emails. They did studies that came up with the same
16 conclusions.

17 So you had not only the collection of stuff that they told
18 people they weren't going to collect, but the character of what
19 they were collecting was very personal. And they knew what
20 they were doing, you know, at least there is a jury argument
21 that they knew and were on notice to what they were doing.

22 They made very large profits from this. I think that goes
23 into the offensiveness --

24 **THE COURT:** How --

25 **MR. BOIES:** -- calculation.

1 **THE COURT:** How do they really -- I understand you
2 have your disgorgement theory. How do they make large profits
3 from this. This being, I assume, the information you're saying
4 that they are, in an anonymized way or otherwise, collecting.
5 How does that then connect up to the large profits that they
6 were making? I know you have expert information on this that
7 theorizes it, but what --

8 **MR. BOIES:** Well, there's expert information, but also
9 there's what we -- what we know that they do. I mean, for
10 example, it's not just our experts. Their own -- their own
11 documents, and to some extent their own interrogatory
12 answers --

13 Let me see if I can -- I think I've got something in here
14 that actually addresses, you know, that issue.

15 If I can go to page 21. This is from Google's responses
16 to interrogatories in this case. This is Google's Fourth
17 Supplemental Responses and Objections to Plaintiffs'
18 Interrogatories, Set One, at 16.

19 "Google uses user data collected via GA for Firebase
20 across teams for product development, improvement, and
21 diagnostics."

22 So it's not just putting it on the shelf. Google's
23 response to Interrogatory 14, at the end it goes through all
24 the logs. It says:

25 "Google has provided exacting details of its main

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1 logs associated with the transmission of
2 app-interaction/measurement data to Google via Google
3 Analytics for Firebase when a user has turned WAA off."

4 So we're talking about when they've turned WAA off. It
5 then says:

6 "Google states, however, that it is not practical or
7 relevant to account for every single potential data source
8 (including logs) that may contain such data because there
9 are various downstream users of the pseudonymous data."

10 Okay. Various downstream uses, so many that they can't
11 even count them. They can't even tell us in an interrogatory.

12 The Hochman report, our expert report, at paragraph 273 is
13 the one I've got here, where it says:

14 "Google's collection of WAA/sWAA-off data also
15 enables Google to serve targeted advertisements."

16 We took a deposition of a former Google software engineer,
17 Blake Lemoine, and he testified about how they used WAA-off
18 data for their AI.

19 The Hochman report, paragraphs 102 and 305, also have
20 additional detail.

21 But interrogatory number 15, if I can go to my chart 28,
22 we said interrogatory 15:

23 "Please describe how Google currently uses and
24 previously during the class period has used WAA-off data."

25 So -- and you'll see the response is here, and they say at

1 the end, and I've highlighted it on the screen, but they say at
2 the end that the use "includes pseudonymous conversion tracking
3 and ad targeting for anonymized ad profiles." So they're using
4 it for ad targeting.

5 Now, they then gave a supplemental response to number 15,
6 which is at docket 364-22, at 9 to 10, in which they gave
7 additional examples of how they use this -- they use this
8 information.

9 **THE COURT:** But then the -- is the premise that
10 because they used the information, somehow then all the profits
11 they make are ascribable to this?

12 **MR. BOIES:** No. No.

13 **THE COURT:** Okay. Well, and that's where your experts
14 do their calculation.

15 **MR. BOIES:** Exactly. No, no, we're not claiming all
16 their profit. I mean, the \$644 million, I think that may be a
17 daily profit for them. I don't know how much they make, but
18 they make so many hundreds of billions of dollars that --

19 **THE COURT:** So you're not asking for all of it.

20 **MR. BOIES:** We're not even asking for 10 percent of
21 their profits.

22 **THE COURT:** Okay.

23 **MR. BOIES:** But what you can see is that there is
24 enormous value, you know, in what is done. There are a lot of
25 different uses.

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1 They can argue to the jury, well, this wasn't all that
2 valuable. Yes, we collected it, but we could have done it some
3 other way, and the plaintiffs are asking for too much money.
4 Those are all jury arguments. Those aren't -- and to the
5 extent perhaps maybe a *Daubert* argument, but it's not a summary
6 judgment argument. These are all pieces of evidence from which
7 we can properly argue to the jury that they have taken
8 something for which there was a market, for which there was
9 great value to Google and value to the user as well.

10 **THE COURT:** Okay. Can I now turn to Mr. Santacana to
11 respond?

12 And I referred to you as Mr. Salcedo. I apologize to
13 Mr. Santacana.

14 **MS. SANTACANA:** Thank you, Your Honor.

15 I'd like to start where Mr. Boies ended on harm.

16 Your Honor, the data that we're talking about here, and
17 there hasn't been a serious disagreement about this, is not a
18 diary. It isn't a videotape of somebody even with their face
19 blurred. The data here is a list of receipts that Google never
20 uses but for the purpose of keeping records. That's the data
21 we're talking about.

22 And when --

23 **THE COURT:** Does keeping records potentially have some
24 value? Because you're then sharing this recordkeeping to
25 assist, as I understand it, advertisers in what they're doing,

1 or at least to --

2 **MS. SANTACANA:** Yeah, report --

3 **THE COURT:** It can be described as, hey, you're doing
4 a good job --

5 **MS. SANTACANA:** Right.

6 **THE COURT:** -- look at this.

7 **MS. SANTACANA:** Exactly.

8 **THE COURT:** It's to boost them up a bit.

9 **MS. SANTACANA:** Report the effectiveness of the
10 campaign.

11 **THE COURT:** There you go.

12 **MS. SANTACANA:** Yeah. Absolutely.

13 **THE COURT:** Okay. So you sort of say, well, that's,
14 you know, no big deal. It's kind of just recordkeeping. But
15 to share it with them sort of implies to me that you think
16 there's some value to it.

17 **MS. SANTACANA:** Your Honor, I mean, I think you're
18 using some value to it, I guess, in the colloquial sense.

19 **THE COURT:** True.

20 **MS. SANTACANA:** The question on this motion is not
21 whether there's value to Google, but whether there's harm to
22 the class that is provable on a class-wide basis.

23 **THE COURT:** Well, although we would get to the value
24 issues when we're trying to quantify the harm.

25 **MS. SANTACANA:** If there is any harm to begin with,

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1 sure. But I'm saying there's no harm to begin with, right?
2 The activity of keeping an anonymized receipt that an ad was
3 served is not harmful to anyone. And if it were, there would
4 be evidence of it that someone other than these plaintiffs'
5 counsel cared about it.

6 Not even their clients cared about it when they testified.
7 What their clients cared about was personalized advertising.
8 That's what they testified about: I don't want you to know
9 everything I'm doing, and send me better ads when I turn WAA
10 off. One of them said I do want you to do that, but not when I
11 turn WAA off, and then the rest said I never want you to do
12 that.

13 We're not doing that. We said we wouldn't. We're not
14 doing that.

15 When we're talking about a market for data, I'm aware of
16 four -- sort of four leading cases on the question of whether
17 you can get past, on the tort claim and on the CDAFA claim, the
18 filter of Rule 12 or Rule 56 with a market for data. Two of
19 them are yours, *Katz-Lacabe* and *Williams versus Facebook*, one
20 of them is Judge Chhabria's in *McClung versus AddShopper*, I
21 think it's called, and then the *Hazel* case by Judge Breyer.
22 They all come out the same way. The only case that comes out
23 the other way is *Brown*.

24 And in *Brown*, which is the one plaintiffs hammer on, they
25 are the plaintiffs' counsel in that case, what Judge Gonzalez

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1 Rogers was evaluating was an allegation that browsing histories
2 were being collected and incognito mode. This case is not
3 about browsing histories. The allegation in *Brown* is that they
4 were then being used to target advertising. This case is not
5 about browsing histories being used to target advertising.

6 It is undisputed -- their own expert says we don't
7 personalize advertising with sWAA-off data. In the second
8 paragraph of their class certification motion they actually
9 accuse us of being deceptive by not personalizing advertising
10 with WAA-off data. They say because if we did, then it would
11 tip off the plaintiffs that we are using it for something, that
12 we have saved it, but now, at summary judgment, they're telling
13 you that we are, with no evidentiary basis.

14 So on the market for data, what they've done is convert
15 what is really another disgorgement theory into a theory of
16 actual damage. And the way it goes is, well, Google is paying
17 or Nielsen is paying or somebody is paying people for their
18 browsing histories. Again, this case is not about browsing
19 histories. We're not using browsing histories for anything
20 that are sWAA-off.

21 But in any case, they can sign up right now for Google
22 Screenwise program and they can get their \$3 per month right
23 now. The value of their data has not diminished one iota.
24 Google has not stood in their way of selling their data. And
25 since Google isn't using browsing histories, like the ones that

1 are collected in the Screenwise program for any purpose, such
2 as to profit, Google is not also causing any harm to them by
3 getting away with stealing something that they could have paid
4 for.

5 So it is a complete misnomer to point to that program and
6 say --

7 **THE COURT:** Well, I'm having trouble with your
8 argument to the extent you're saying, well, they haven't been
9 harmed because they can go out and get the \$3 a month today.
10 But that's not really the question, is it? It's the \$3 a month
11 is being pointed to by the plaintiffs to me to show that
12 there's some value to this. The harm could -- maybe they don't
13 want to sell it, but the \$3 a month is just -- is putting some
14 value parameter to show that it's not worthless --

15 **MS. SANTACANA:** Yes.

16 **THE COURT:** -- information. But is it enough to say,
17 well, they're not harmed, because if they really want the money
18 they can go out and get it. That's really kind of beside the
19 point.

20 **MS. SANTACANA:** No, it's not. And this point puts the
21 lie to their damages model, because what they're saying is if
22 it has value in the abstract, then I must have been harmed.

23 But the claims require harm. They're not -- the claim
24 says actual damage or loss. Okay. What was the damage? What
25 was the loss? Did they lose --

1 **THE COURT:** Let's posit a person who says: I
2 absolutely don't want my information to be shared with anybody.
3 And then the question is -- and a lawsuit is brought, and you
4 say, well, no harm, no foul, this is valueless information.
5 And so then they come back and say, no, look, there is a value
6 to this, but the individual that we represent, it doesn't --
7 there's harm to them because information that is of value is
8 being used and they don't want it to be used.

9 **MS. SANTACANA:** Yes. Control over their private
10 information.

11 **THE COURT:** So, and you're saying, well, but they
12 can't be harmed because they can sell the information. They
13 haven't, you know, their information is just as valuable today
14 as it was when we did what we were alleged to have done. But
15 that's ships that are passing in the night. That's not going
16 to the question of, you know, is there a value in this,
17 whatever the person wants to do with the information.

18 **MS. SANTACANA:** So the -- I don't think it's ships
19 passing in the night. I think the issue -- this is exactly my
20 point, is that what you just articulated is a desire to control
21 private information, which is the traditionally, you know, the
22 restatement talks about this. This is what invasion of privacy
23 torts are all about. And the harm is the emotional distress
24 that is caused by preventing me from being able to control it.
25 And then you say how do I measure that harm? And it would be

1 unusual to say, well, if you had sold it, it would have been
2 worth X, Y and Z.

3 Now, you might say I want disgorgement as a form of relief
4 or you might --

5 **THE COURT:** Or one could also interpret that as being
6 an answer to your claim that no harm, no foul because this is
7 worthless. And they're saying it's not worthless, in fact,
8 there's a market out there.

9 So, and that's answering that question. It's not going to
10 the issue of -- unless they want to sell it they can't be
11 harmed.

12 **MS. SANTACANA:** Yeah, and I think maybe I'm not --

13 **THE COURT:** I understand. I think I know what you're
14 trying to tell me, so we can move on to the next point.

15 So go ahead.

16 **MS. SANTACANA:** Okay. Well, to jump off of that
17 point, I heard nominal damages come up I think four times when
18 counsel was speaking. That's four more times than it came up
19 in the briefing, so this is a little bit
20 fly-by-the-seat-of-the-pants.

21 But here's the problem with the reference to nominal
22 damages. The Supreme Court for the longest time, going back to
23 *Amchem versus Windsor*, Justice Ginsburg's opinion, says,
24 effectively, personal injury is a pretty dangerous place for
25 class actions, for a lot of reasons.

1 What you just heard counsel say is even if you don't
2 believe me on the market for data, even if you don't believe me
3 on the battery depletion, even if you don't believe me on
4 disgorgement, I should still be able to go to trial and
5 collect, presumably, they will say, a penny for each class
6 member, or some amount of nominal damage, which I don't think
7 is the law anyway. It could be just one dollar for the entire
8 class.

9 But in *Amchem*, what the Court says is, well, hold on a
10 second. If your claim is that some people in this class
11 suffered emotional distress, now you aren't representing them
12 adequately, because that means that you are asking only for
13 nominal damages for someone who suffered actual harm. This is
14 why we don't do this in class actions unless in the most
15 clearest of cases.

16 So the nominal damages piece is not a loophole to get
17 around what is clear case law from the Supreme Court, *Comcast*
18 *versus Behrend*, *Amchem versus Windsor*, *Fibreboard versus Ortiz*
19 that says when you're doing damages in a class you have to be
20 careful, the model has to match the liability theory. And if
21 you're dealing with personal injury, then you have to be
22 careful about individualized issues.

23 That is why, Your Honor, at the class cert. stage in their
24 brief they disclaimed any reliance on this. Mr. Boies was
25 talking about emotional distress and saying he can collect

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1 nominal damages, but in their brief they disclaim this. And I
2 can give you the page cite if you'd like it, but I'm sure you
3 remember the hearing. They said: I don't have to do that type
4 of damage. What I want is disgorgement. Well, then *TransUnion*
5 is decided and *McClung* is decided and now disgorgement doesn't
6 look so good, so now they're talking about nominal damages
7 again.

8 **THE COURT:** You want to address for me the anecdotal,
9 in the sense --

10 **MS. SANTACANA:** Yes, I do.

11 **THE COURT:** -- information from some of your people --

12 **MS. SANTACANA:** Yes, I do want to address it.

13 **THE COURT:** -- that Mr. Boies drew my attention to.

14 **MS. SANTACANA:** Yeah. Your Honor, these emails are
15 trotted out in every one of these cases. This is a
16 150,000-person company. I think, as you pointed out, context
17 is probably the best way to weed out ones that matter from ones
18 that don't, ones that are relevant from ones that don't. Half
19 of the ones he showed you he also showed Judge Gonzalez Rogers
20 in *Brown*, which has nothing to do with this case.

21 So the other half are seriously flawed, and I am happy to
22 go -- I could go through each one right now if that's what you
23 want.

24 **THE COURT:** Well --

25 **MS. SANTACANA:** But at a more general level --

1 **THE COURT:** Yeah.

2 **MS. SANTACANA:** -- to be hopefully more helpful to
3 Your Honor, the problem with that evidence is that not one of
4 them addresses the specific conduct that is being sued upon
5 here. And by their logic, they could sue Google over and over
6 again as to WAA in each one of every aspect they can come up
7 with if anybody ever found WAA confusing as to some other
8 aspect.

9 So I find that's one problem with it, because WAA is
10 actually a very capacious button. You've seen the description:
11 Chrome history is in there, sites are in there, app data is in
12 there - there's all kinds of stuff in there. So, you know,
13 that could become a cottage industry in and of itself if these
14 12 emails are sufficient to get past summary judgment.

15 **THE COURT:** Well, you know, it really, to some extent,
16 goes back to my initial question to you, which is from a very,
17 very simplistic level, what I understand the plaintiffs to be
18 saying is certain of their class members are operating on the
19 understanding that even -- and this puts aside your issues with
20 respect to the language of the privacy policies and the like,
21 but that they think they have exited any use of anything
22 anonymized or otherwise about them. And some of those emails,
23 whether or not they, you know, are applicable in all sorts of
24 other cases, they go to that question.

25 **MS. SANTACANA:** Yeah.

1 **THE COURT:** They go to the issue of saying the
2 consumer out there thinks they've checked out, and they
3 haven't. Pretty simplistic thing. But just because those
4 emails may have applicability in other lawsuits doesn't mean
5 they get disregarded in this one.

6 **MS. SANTACANA:** The point is well taken, and I think
7 the best way to address that is to address an example.

8 So four of the examples you were shown or four of the
9 slides you were shown were all authored by an employee named
10 Chris Rumler, who comes up in every one of these cases. The
11 plaintiffs all over the country love Chris Rumler and his
12 colorful emails.

13 And what Chris Rumler was talking about in these emails,
14 he was really upset about it over the course of months, he
15 wrote email after email after email, and this is what he
16 testifies to. It's in the record, we put in it there. He
17 works on Gmail. There's only one kind of data in Gmail - data
18 tied to your identity. That's how Gmail works. This is like a
19 foreign concept to him, that there's such a thing as anonymized
20 data, because it doesn't -- it didn't enter his mind. And so
21 he's asked about it by these lawyers, and he explains that: I
22 read a technical proposal from a different product team I know
23 nothing about. I misunderstood it to mean that Google was
24 going to identify data in a log with the person's GAIA ID,
25 which is basically their email address, their Gmail address,

1 even when WAA was off, and I was really upset about that.
2 Which is exactly what Google wants its employees to do, is be
3 on the lookout for this sort of thing. And once it was
4 explained to him, and once he understood the proposal, he
5 changed his mind. He has disavowed the plaintiffs' view.

6 **THE COURT:** Now I'll ask you the question you know is
7 coming on summary judgment --

8 **MS. SANTACANA:** Sure.

9 **THE COURT:** -- which is that's all well and good, but
10 why should that be the only interpretation that is adopted such
11 that --

12 **MS. SANTACANA:** Right.

13 **THE COURT:** -- the obvious alternative interpretation
14 of those, some of those statements is disregarded? I mean,
15 isn't that something for the jury to hear what you just said
16 about explaining the Rumler comments. And you'd be perfectly
17 free to have this individual on the stand and to explain it
18 exactly as you just have explained it. But on summary judgment
19 isn't it a tall order to say that I have to adopt that
20 interpretation? Because the counter --

21 **MS. SANTACANA:** I don't think you do.

22 **THE COURT:** -- the alternative interpretation is what
23 I said before, that it is indicative of or supportive of the
24 argument, from a macro level, that the plaintiffs are making
25 that their class members think they're out from under, and even

1 within Google there are people who are saying that's what they
2 think, and that's not what's happening.

3 **MS. SANTACANA:** Right.

4 **THE COURT:** I mean, it's pretty simplistic, I
5 understand, and you have all sorts of reasons why context
6 matters, and it's not what you think it is, and all that, and
7 I'm not surprised. But, you know, I am at summary judgment
8 so...

9 **MS. SANTACANA:** I understand, and credibility is
10 generally a trial issue, and I'm not asking Your Honor to adopt
11 a particular interpretation of the statements. I'm just
12 putting them in context of the record evidence. That's all I'm
13 doing, because you requested it.

14 But on the legal question of consent, which I think is
15 what we're talking about right now, I do not think that Chris
16 Rumler's statements undermine the plain language of the
17 disclosure and the privacy policy, and I -- because they can be
18 read consistent with what we're saying it means. And what
19 they're saying it means cannot be reconciled with the plain
20 language.

21 Again, it doesn't say you are out from under, nothing --
22 this android device will just shut down and not send anything
23 to Google ever about anything. We won't save anything.

24 I'll just give you a ridiculous example, right. If a user
25 turns WAA off on their android device and then downloads an app

1 in the Google Play Store, under plaintiffs' theory of what is a
2 reasonable reading of WAA, Google would not be permitted to
3 keep a log that that device downloaded that app.

4 If that same device then pays for something using Google
5 Wallet on a web site, according to them Google would be
6 disabled from keeping a record that this user used Google
7 Wallet to pay for this item on the Internet.

8 If that same user then logged into Google and sent an
9 email through Gmail, under their theory we would then have to
10 delete that.

11 **THE COURT:** Of course under all of those examples
12 Google is retaining the information, not sharing it with
13 anybody else.

14 **MS. SANTACANA:** Nor is -- well, it's not sharing -- I
15 guess I don't understand your question.

16 **THE COURT:** Well, in this particular scenario the, as
17 I understand it, the anonymized data is ultimately going to
18 advertisers in the form of saying, look, your ads are working.
19 This is good -- the information is being utilized by Google
20 outside of Google.

21 **MS. SANTACANA:** There's no evidence that Google is
22 sharing individual level --

23 **THE COURT:** Oh, I understand that. I understand that
24 it's, if you will, being packaged, but the information is
25 being -- is being characterized by Google to third parties in

1 the form of saying, look, your ads are working.

2 **MS. SANTACANA:** Sure.

3 **THE COURT:** And some of the information that goes into
4 that communication is this anonymized data.

5 **MS. SANTACANA:** Well, I guess I'm not sure what
6 connection that has to the description of WAA, which is not --
7 is not talking about whether we will or won't share aggregated
8 information with advertisers -- that's sort of orthogonal, I
9 think, to the --

10 **THE COURT:** So you're saying that under their reading
11 there's a violation -- you would be violating the policy even
12 if there is operational information that's -- that at a certain
13 period of time is within Google. I understand what you're
14 saying, right.

15 **MS. SANTACANA:** Yeah, I mean, the guy who sold the
16 sneakers to the user --

17 **THE COURT:** Got you. Yeah, I understand.

18 **MS. SANTACANA:** So just a couple more points on this,
19 Your Honor.

20 First, I just want to be clear, Google doesn't share the
21 device identifiers with advertisers. So whether it's a consent
22 question or a --

23 **THE COURT:** You get into the *could* issue, which we've
24 already hashed out.

25 **MS. SANTACANA:** Okay. Well, if you feel like we've

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1 hashed it out -- I felt like I heard something relatively new,
2 in that, the argument you asked counsel if it could be but it
3 never is and it never has been, is that still actionable?

4 **THE COURT:** Mm-hmm.

5 **MS. SANTACANA:** On that, just on that question I think
6 there's significant case law that says no, it's not actionable.

7 And whether you want to analyze that under harm or
8 expectation of privacy or even just under the consent rubric,
9 depending on the case it comes out in different places, but the
10 *Hammerling* case, which is affirmed by the Ninth Circuit, is one
11 of them that analyzes it on consent.

12 And there's a couple of others in our papers.

13 **THE COURT:** Mm-hmm.

14 **MS. SANTACANA:** So I just think that would be
15 stretching the law to a place it hasn't gone to before, and
16 there isn't a case that's been cited on that basis.

17 The *Brown* case doesn't go that far either. The *Brown* case
18 says this is a browsing history that's -- that is identifiable
19 because it's an entire browsing history. Where, as here, what
20 we're talking about is the record of ad service.

21 **THE COURT:** *Hammerling* was a non-published --

22 **MS. SANTACANA:** The panel decision is unpublished,
23 yes. And the lower court decision makes the same ruling.
24 That's why I say it was affirmed, but --

25 **THE COURT:** I understand.

1 **MS. SANTACANA:** -- not published.

2 Okay. So the last point I wanted to make, Your Honor, is
3 about the privacy policy.

4 The plaintiffs rely on the privacy policy to make their
5 claims, while at the same time arguing that we shouldn't assume
6 users read it. But the plaintiffs who testified each testified
7 and submitted declarations, which we have in our papers, that
8 say "I read and relied on the privacy policy."

9 So I understand it's a legal fiction that, you know,
10 people read all the terms of use and all these things. But in
11 this case the testimony from the plaintiffs is: I read it and
12 relied on it, that's why I'm here.

13 So yes, I could pick out phrases that are ambiguous if
14 read in isolation, but I think at a minimum the court should
15 analyze the WAA disclosures and the privacy policy together
16 holistically. And when done that way, one thing is very clear.
17 Mr. Boies said Google could easily say there's such a thing as
18 not your personal information. We say that. We say it in the
19 privacy policy over and over and over again and provide a
20 definition that distinguishes personal information which is
21 associated with a Google account from non-personal information
22 which we say cannot reasonably be linked to your identity.

23 So we do say that in the privacy policy, and I do think
24 that has to be -- and it may be 27 pages long -- we say it at
25 least every couple pages, and that has to be part of the

1 analysis.

2 And if, if this motion comes down to, well, there's a fact
3 question about whether it can reason -- it could reasonably be
4 linked to your identity by somebody somehow someday, as I said,
5 I don't think the law supports that on the consent side. It
6 definitely doesn't support it on the harm side, Your Honor.
7 Because even if it could reasonably be linked, a browsing
8 history that falls in the woods can't hurt anybody.

9 And it may be that one day somebody can point to actual
10 harm, but as of today, looking back, class wide, Google kept
11 its word.

12 Thank you, Your Honor.

13 **THE COURT:** Thank you.

14 **MS. SANTACANA:** Yeah. Actually, I'm sorry, can I
15 address one more thing?

16 **THE COURT:** Yeah, go ahead.

17 **MS. SANTACANA:** So Mr. Boies showed you an
18 interrogatory response. I don't know how much weight Your
19 Honor would put on that, but I want to make sure it's clear to
20 Your Honor that that interrogatory response that he showed you,
21 which says that there's such a thing as anonymized ad profiles,
22 it is explained in the supplemental response and also in
23 deposition testimony that that was an edge case where somebody
24 is sharing their device in a signed-out state, and the owner of
25 the device has WAA off, but the device doesn't know that when

1 they're sharing it with somebody else.

2 So it's really not a class-wide issue. They're edge cases
3 where if somebody -- if people are sharing tablets, it's
4 unclear which account is going to control the way the data is
5 treated, and that's all that was meant by that.

6 So I'm not sure the court should put any weight on that.

7 **THE COURT:** Okay. Thank you very much. Very helpful
8 argument.

9 I'll take the matter under submission and get you an
10 order.

11 **MS. SANTACANA:** Two housekeeping things, Your Honor.

12 **THE COURT:** Yes.

13 **MS. SANTACANA:** So first, because of the class notice
14 schedule, we wanted to make sure Your Honor is aware that a
15 summary judgment order probably should not issue, I think best
16 practice is not to issue before the opt-out period closes. The
17 parties are agreed on that.

18 By our calculations we're looking at sometime in January,
19 maybe late December, if we're lucky, is when the opt-out period
20 will close, and right now trial is scheduled for early
21 February.

22 So we've lightly talked about what we should do but wanted
23 to sort of put it on your radar that we may need to move the
24 trial a little bit, and we're not sure what your schedule looks
25 like.

1 **THE COURT:** But it does -- you know, this issue does
2 not -- it's a bit academic, because I, frankly, wasn't even
3 focused on the February trial date in this case. But that's
4 not -- that's not a realistic date for my schedule, so we're
5 going to have to reassess that in any event.

6 But I'm happy to -- I'm happy to hold off a pending -- the
7 parties will -- can the parties agree that they can give me the
8 trigger of, okay, you know, we've passed the date -- and I
9 understand the reason why, because, you know, binding class
10 members and the like. But I'll leave it to you to tell me so
11 it doesn't just fall through the cracks and I'm doing other
12 things.

13 **MR. BOIES:** We can do that.

14 **MS. SANTACANA:** Sure. Absolutely, Your Honor.

15 **THE COURT:** Okay. Very good. Thank you.

16 **ALL COUNSEL:** Thank you, Your Honor.

17 (Proceedings adjourned at 3:17 p.m.)
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

Dated: July 26, 2024

A handwritten signature in cursive script, appearing to read "Rhonda L. Aquilina", is written over a horizontal line.

Rhonda L. Aquilina, CSR #9956, RMR, CRR, CRC
U.S. Court Reporter